In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-940

CONSUMER FEDERATION OF AMERICA, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

No. 75-995

INDEPENDENT MEAT PACKERS ASSOCIATION, PETITIONER

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

No. 75-996

NATIONAL ASSOCIATION OF MEAT PURVEYORS, ET AL., PETITIONERS

v.

EARL L. BUTZ, SECRETARY OF AGRICULTURE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of a decision of the court of appeals that sustained the Secretary of Agriculture's re-

vised beef grading regulations.[1]

On March 12, 1975, the Secretary of Agriculture promulgated, pursuant to Section 203(h) of the Agricultural Marketing Act of 1946, 60 Stat. 1087, as amended, 7 U.S.C. 1622(h),[2] revised regulations governing the federal grading of carcass beef. The regulations reduced the amount of internal fat (marbling) that the beef must contain to come within each federal quality grade, and required that beef submitted for quality grading also be graded for yield.[3]

The regulations were promulgated in accordance with informal rulemaking procedures prescribed by the Administrative Procedure Act, 5 U.S.C. 553(c), and were accompanied by an exhaustive "Statement of Considerations" that set forth the purpose of the revisions, the history of prior regulations, the results of recent research

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[1]Petitioners' applications for a stay of the mandate of the court of appeals were denied by Mr. Justice Blackmun on January 9, 1976, and the revised regulations went into effect on February 23, 1976 (41 Fed. Reg. 2371).

[2]This provision in pertinent part authorizes the Secretary of Agriculture:

> To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products * * * under such rules and regulations as [he] may prescribe * * * to the end that agricultural products may be marketed to the best advantage * * * and that consumers may be able to obtain the quality product which they deserve * * *.

[3]The Department of Agriculture grades beef for "quality" and for "yield." "Quality" grades, such as "prime," "choice," "good," and "standard," measure palatability; "yield" grades indicate the ratio of meat to fat.

and analyses, the comments and criticisms on the proposed regulations that the agency had received from various interested groups, and the agency's evaluation of the comments and criticisms (40 Fed. Reg. 11535). The record upon which the Statement was based showed that revision in quality grading was favored by cattle producers, meat packers, meat scientists, and by at least one consumer group, the Center for Study of Responsive Law, Ralph Nader, Trustee.[4] Moreover, it was supported by six scientific studies (Pet. App. A. 9).[5] The proposed yield grade revision similarly was favored by cattle producers, institutional users, and meat scientists.

On April 1, 1975, petitioner Independent Meat Packers Association brought this suit in the United States District Court for the District of Nebraska, seeking, *inter alia*, to enjoin the Secretary of Agriculture from implementing the revised regulations. Petitioner alleged, *inter alia*, that the Secretary had no authority to promulgate the regulations and that the regulations violated Executive Order No. 11821, 39 Fed. Reg. 41501, which requires that proposed regulations be evaluated for their potentially inflationary impact (Pet. App. B. 2 to B. 3). On April 11, 1975, the district court granted petitioner's motion for a preliminary injunction and the court of appeals affirmed (514 F.2d 1119).

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[4] The Center stated that the proposed change in quality grading would benefit the consumer by reducing meat prices if the savings of the industry were passed on to the ultimate buyer, and by increasing the amount of meat protein per pound of lean, which would help reduce the incidence of heart disease. See Defendant's Exhibit No. 671 at 4, a copy of which has been lodged with the Clerk of this Court.

[5] "Pet. App." refers to the appendix in No. 75-940.

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On remand, the district court permitted petitioners National Association of Meat Purveyors, National Restaurant Association, and Consumer Federation of America to intervene as party plaintiffs. Petitioner Consumer Federation of America alleged, *inter alia*, that the Secretary's decision to revise the quality grading standards was not based upon substantial evidence.

After a trial, the district court found that the Secretary's decision to revise the quality grading standards was based upon substantial evidence (Pet. App. A. 9).[6] The court held, however, that the Secretary lacked statutory authority to implement the proposed revision in yield grading (Pet. App. A. 20), and that the Secretary had failed to comply with Executive Order No. 11821 in promulgating the revised regulations (Pet. App. A. 23). Accordingly, the district court permanently enjoined the Secretary from implementing the regulations (Pet. App. A. 24 to A. 25).

The court of appeals reversed the judgment of the district court, dissolved the injunction, and remanded the case to the district court with instructions to dismiss the complaint. The court held that Executive Order No. 11821 was not issued pursuant to a statutory mandate or delegation of authority from Congress but rather was intended primarily as "a managerial tool for implementing the President's personal economic policies" (Pet. App. B. 14); that petitioners had no standing to challenge the Secretary's alleged failure to observe the order because the order was not judicially enforceable by private action (Pet. App. B. 14 to B. 15); and that the Secretary had authority under 7 U.S.C. 1622(h) to implement the

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[6]The district court conducted a ten-day trial *de novo* that generated seventeen volumes of testimony and several hundred exhibits (Pet. App. B. 4).

revision in yield grading (Pet. App. B. 15).[7] The court of appeals declined to review the district court's finding that the Secretary's decision to revise the quality grading was supported by substantial evidence (Pet. App. B. 18).

1. The court of appeals correctly determined that Executive Order No. 11821 does not create a private right of action. An Executive Order, such as No. 11821, which is issued simply as a means of managing the executive branch, and not pursuant to a specific statute or to effectuate a statute, does not create a private right of action enforceable by third parties in the federal courts. *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451 (C.A. D.C.); *Kuhl* v. *Hampton*, 451 F.2d 340 (C.A. 8).

2. The court correctly sustained the exercise of the Secretary's authority to promulgate the revised yield grading regulation that requires that all beef submitted for quality grading be graded as well for yield. Section 203(h) of the Agricultural Marketing Act, 7 U.S.C. 1622(h), authorizes the Secretary to conduct a federal beef grading program to "the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire." In conducting this program the Secretary must "develop and improve standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards." 7 U.S.C. 1622(c). As the court of appeals noted, the Secre-

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[7] The court further ruled that the district court had exceeded the appropriate scope of review under 5 U.S.C. 706(2)(A) by conducting a *de novo* trial and should have limited its inquiry to the administrative record. The court undertook its own thorough inquiry into that portion of the administrative record dealing with the revision in yield grading and determined that the Secretary had not acted arbitrarily in promulgating that revision (Pet. App. B. 23 to B. 27).

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tary's decision to combine yield grading with quality grading clearly was authorized by these provisions.

3. The court correctly held that the appropriate standard of review of the Secretary's decision to issue the revised yield grading regulations was whether that decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). *Camp* v. *Pitts*, 411 U.S. 138; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402. The court thoroughly reviewed the administrative record and correctly sustained the Secretary's decision under that standard.

4. Petitioner Consumer Federation of America contends that the court of appeals erred in declining to review the district court's finding (Pet. 9-12) that the Secretary's decision to issue the revised quality grading regulations was supported by substantial evidence. Petitioner, as an appellee in the court of appeals, had sought review of that finding, contending that insufficiency of the evidence was an alternative basis for affirming the judgment of the district court. It would have been preferable for the court of appeals to have reviewed the district court's finding with regard to the substantiality of the evidence. But in the circumstances of this case, the court of appeals' failure to review that finding does not warrant further prolongation of this litigation and unnecessary continued uncertainty in the industry. As we now demonstrate, there was ample basis for the Secretary's decision to revise quality grading standards.

In promulgating the new quality grading standards, the Secretary noted (40 Fed. Reg. 11537):

> Marbling-maturity requirement changes were strongly supported by producers, meat packers, and university meat scientists. Opposition was voiced by most consumers * * * . Opposition was based largely on (1) the fear of a significant reduction in the eating characteristics of Prime and Choice beef, and (2) the belief by consumers that they would have to pay "Choice grade prices for Good grade beef."

Neither of the consumers' concerns was justified.

The Secretary cited six separate published scientific studies finding that "for beef from cattle up to about 30 months of age, changes in maturity do not have a sufficiently significant effect on palatability to justify an increase in marbling" (*id.* at 11536). On the basis of these studies, the Secretary concluded (*id.* at 11537):

> [T]he increases in marbling with increases in maturity provided in the present standards for such beef are not necessary to insure a comparable degree of palatabilty. Therefore, the changed marbling-maturity relationships should provide greater uniformity of eating quality within each of the grades and thereby enhance consumer satisfaction and confidence in grades.

The district court reviewed the studies relied upon by the Secretary and concluded that they supported his decision (Pet. App. A. 9). Petitioners have produced no contrary scientific research evidence; indeed, one of their expert witnesses, Dr. Harold J. Tuma, testified that the results of the studies relied upon by the Secretary were valid (Tr. 907-908).[8]

As to the effect that the change in quality grading standards would have upon the price of beef, the Secretary concluded (40 Fed. Reg. 11537):

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[8] "Tr." refers to the transcript of trial proceedings.

> The slight change in marbling requirements should decrease the costs of producing Choice and Prime grade beef and should encourage their increased production. And, since the quality of beef in each of these grades is not significantly changed, the demand for these grades should not be affected. Thus, an increased supply coupled with an unchanged demand should result in lower prices for Choice and Prime grade beef.

This analysis, which was based in part upon a study by the Department of Agriculture's Economic Research Service (40 Fed. Reg. 11537), was corroborated by two agricultural economists at trial (Tr. 1414, 1574). The testimony of petitioners' only witness with a background in agricultural economics was not to the contrary (Tr. 790).

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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